No. 85-1047

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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. CONRAD MIKULEC,
Petitioner

vs.

KENNETH J. BRAUN, SHERIFF OF
ERIE COUNTY,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Authorities	i
Questions Presented	1
Judgment Below	2
Jurisdiction	3
Statement of the Case	3
Reasons why the Writ should be denied	5
Propriety of issues in extradition proceedings	6
Denial of Hearing	18
Preservation of issue	20
Conclusion	22

TABLE OF AUTHORITIES

Page

CASES

Calder v. Bull, 3 U.S. [Dall] 386 ... 15

Michigan v. Doran, 439 U.S. 282 (1978) 9, 12, 13, 20

People ex rel. Higley v. Millspaw, 281 N.Y. 441 11

Saunders v. Shaw, 244 U.S. 317, 320 21

Whitney v. California, 274 U.S. 357, 362-363 21

STATUTES

New York Criminal Procedure Law §570.08 9

CONSTITUTION OF THE UNITED STATES

Article IV, §2, cl.2 9

QUESTIONS PRESENTED

1. When the petitioner in an extradition proceeding was unable to establish any reasonable ground to believe that he was not in the State of South Carolina at the time of the commission of the crime of conspiracy, did the New York court properly refuse to provide an evidentiary hearing on the issue of petitioner's presence in the State of South Carolina?

2. Did the New York courts properly decline to decide issues of South Carolina substantive and procedural law in the context of an extradition proceeding?

3. May petitioner raise an issue before this Court which has not previously been presented to the state courts?

JUDGMENT BELOW

Following his arrest on a New York Governor's warrant directing his delivery to the State of South Carolina, petitioner sought a writ of habeas corpus to review the propriety of the extradition demand. His application was denied in a memorandum decision dated January 15, 1985 and subsequent judgment (denominated an order) dated January 17, 1985, of the Erie County Supreme Court (Kubiniec, J.). The judgment was affirmed by the New York State Supreme Court, Appellate Division, Fourth Department, in a memorandum and order dated July 17, 1985. 112 A.D.2d 803. Leave to appeal to the New York State Court of Appeals was denied by order dated September 7, 1985, 65 N.Y.2d 610.

JURISDICTION

Jurisdiction is asserted pursuant to 28 U.S.C. §1257(3) and Article III, §§1, 2 of the United States Constitution.

STATEMENT OF THE CASE

On March 12, 1984, the Grand Jury of the County of Spartanburg, State of South Carolina, indicted petitioner for the felony crimes of Burning a Building not a Dwelling, in violation of Section 16-11-120 of the 1976 Code of Laws of South Carolina and Criminal Conspiracy, in violation of Section 16-17-410 of the 1976 Code of Laws of South Carolina (R41-44).[1] The crimes

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[1] Numbers in parentheses preceded by the letter "R" refer to the pages of the Record submitted to the New York State Supreme Court, Appellate Division.

were alleged to have occurred on or about November 30, 1975.

On or about July 13, 1984, petitioner surrendered to New York authorities pursuant to the warrant issued under those indictments. Thereafter, on October 9, 1984, a Governor's Warrant was issued pursuant to the Uniform Criminal Extradition Act. On October 19, 1981, petitioner secured a writ of habeas corpus to test the continued detention under the warrant and the propriety of the extradition proceedings (R22 et seq.).

In support of that application, petitioner submitted affidavits from a number of individuals attesting to the fact that he was not present in the State

of South Carolina on the date of the arson, nor for several days immediately preceding that date (R47-50). He was unable, however, to establish his absence from the state for the period of September, October and November during which preparations were made for the arson.

By a memorandum decision dated January 15, 1985, and judgment (denominated order) dated January 17, 1985, petitioner's application for a writ of habeas corpus was denied.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner's application for a writ of habeas corpus sought to challenge his detention under the New York Governor's warrant. That application

sought to raise a number of legal issues not amendable to determination in an extradition proceeding and otherwise failed to factually establish those that are. Therefore, the courts of New York properly declined to issue a writ of habeas corpus. On this application, however, petitioner now seeks to raise yet another issue not previously presented to the New York courts. That issue, whether the South Carolina authorities "falsified" certain aspects of its extradition demand, is not ripe for review by this Court.

Propriety of issues in extradition proceedings

On this application, petitioner seeks to have reviewed a number of issues which are not susceptible of determina-

tion in the context of an extradition proceeding. Specifically, petitioner seeks to have this Court determine the constitutional necessity for a statute of limitations in the demanding state where the issue has not been presented to the courts of the demanding state. In addition, he seeks to raise questions as to 1) whether the particular statute under which the petitioner is being prosecuted is an ex post facto enactment, 2) whether New York's statute of limitations applied to the South Carolina extradition demand, and 3) whether a prior Florida determination as to extradition, specifically designed not to have preclusive effect, was binding on the courts of New York. Other issues raised before the New York Courts are apparently not presented here.

The particular crime for which extradition was ordered was the crime of conspiracy which the lower court found to be one of a continuing character. Although appellant established that he was not present in South Carolina at the time of the arson fire on November 30, 1975, or for several days preceding that date, the lower court declined to order his extradition with respect to the arson charge. He could not, however, controvert the allegation that he was not present in the state during the three month period during which the co-conspirator alleged that discussions regarding the arson had taken place. Because the indictment specifically alleged that appellant "in Spartanburg County on or about the 30th day of November, 1975, did aid, counsel or

procure the burning of a building," (R41, 43), South Carolina authorities adopted a theory of prosecution which was properly the subject of a constitutional extradition demand under the United States Constitution and New York Criminal Procedure Law §570.08.

The entire concept of extradition derives from Article IV, §2, cl.2, of the United States Constitution, which provides as follows:

> "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."

In Michigan v. Doran, 439 U.S. 282 (1978), this Court explained the

purpose behind the Extradition Clause and noted its intent.

> "Interstate extradition was intended to be a summary and mandatory executive proceeding derived from the language of Art. IV, §2, cl. 2, of the Constitution.
>
> ***
>
> The Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial." 439 U.S. at 288.

The court reiterated its rejection of the notion that the process of extradition is one that determines guilt or innocence and listed the four issues which may be considered on such a proceeding:

> "A governor's grant of extradition is prima facie evidence that the consitutional and statutory requirements have been met.
>
> ***
>
> Once the governor has granted extradition, a court considering release on habeas corpus

> can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradtion; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable." 439 U.S. at 289.

In affirming the lower court's denial of habeas relief here, the Appellate Division, Fourth Department, relied upon the New York State Court of Appeals decision in People ex rel. Higley v. Millspaw, 281 N.Y. 441, which had adopted a restricted listing of what could be litigated in the context of an extradition proceeding.

> "We may not consider the question of the sufficiency of the indictment as a pleading ... nor the possibilities resulting from the trial ... nor the merits of the defense to the indictment or the motive and purposes of the extradition

proceedings ..." 281 NY at 445 (citations omitted)

The legal issues which petitioner presents at this time are, at best, characterized as due process claims. To allow the litigation of general due process claims at this stage seriously subverts the intent behind Articve IV, §2, cl. 2 of the United States Constitution and the holding of Michigan v. Doran, supra. There, the Court was confronted with the question of whether the courts of an asylum state could review the existence of probable cause for an arrest in the demanding state. In rejecting the ability to do so, this Court held that:

> "Under Art. IV, § 2, the courts of the asylum state are bound to accept the demanding state's judicial determination since the proceedings of the demanding state are clothed with the

> traditional presumption of regularity. In short, when a neutral judicial officer of a demanding state has determined that probable cause exists, the court's of the asylum state are without power to review the determination. Section 2, cl. 2, of Art. IV, its companion clause in §1, and established principles of comity merge to support this conclusion. To allow plenary review in the asylum state of issues that can be fully litigated in the charging state would defeat the plain purposes of the summary and mandatory procedures authorized by Art. IV, §2." 439 U.S. at 290.

A claim regarding the absence of a statute of limitations, asserted under the Due Process clause of the Sixth Amendment stands on no firmer footing than the Fourth Amendment claim raised in Doran, supra.

Appellant's related claim that the delay in indictment similarly deprives

him of due process rights by his inability to defend himself must also receive the same treatment. Since South Carolina has no statute of limitation, the indictment for a nine year old offense is valid on its face. If due process concerns are to be considered, they must be left solely to the demanding state for resolution.

Similarly, the issue of the application of an ex post facto law must also fail. Although appellant contends that the issue is one which may be determined from the face of the papers, such is not clear. Even if it can be assumed that such a constitutional challenge may be raised in an extradition proceeding, whether the crimes charged are the result of the application of an ex post facto law is not apparent.

In Calder v. Bull, 3 U.S. [Dall] 386, the Supreme Court established the standard for the evaluation of claimed ex post facto applications:

> "1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was when committed. 3. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender."

There is no indication in this record that conduct for which this appellant was indicted was not criminal, was less serious, was punished less

severely or required more evidence to prove when it was committed than now. In the absence of such proof, appellant has failed to satisfy his burden of proof with respect to that issue.

Finally, the lower court properly declined to give res judicata effect to the prior Florida voluntary dismissal of an extradition proceeding. When the Florida authorities were unable to obtain a second Governor's warrant and were unable to proceed with proof on the existent habeas corpus proceeding, a Notice of Voluntary Dismissal was submitted which included the following reasons for the dismissal.

> "10. The State has not yet received new Governor's Papers curing this defect, the Governor's office of the State of Florida has not, as of this

> date, received new requisition documents. Therefore, the State must now either proceed in a hearing on the Petition for Writ of Habeas Corpus, and not prevail, or else must enter a dismissal.
>
> 11. Therefore, the State, rather than create a possible Res Judicata argument in the future, now enters a voluntary dismissal of the present extradition hold on the Defendant, based upon the current Governor's Warrant, with prejudice." (R66-67) (emphasis added).

Clearly, the intent was that any res judicata effect be avoided by the voluntary dismissal. Moreover, the use of the term "current Governor's warrant" in both the notice and the order indicates that the dismissal order was to apply only to the warrant then existing and not to any future warrants. In essence, a factual determination was made by the lower court as to the res judicata

intent behind the Voluntary Dismissal.

Denial of Hearing

The South Carolina indictment charged petitioner with the felonies of Burning a Building not a Dwelling and Criminal Conspiracy. Those indictments clearly established that the crimes were committed in Spartanburg County, South Carolina and were committed "on or about the 30th day of November, 1975." Petitioner challenged his presence in the State of South Carolina at the time of the crimes by submitting various affidavits attesting to his presence in another state on November 30th and for several days prior thereto. To that extent he was successful insofar as the New York courts declined to order extradition on the arson charge. How-

ever, based upon the transcript of the testimony of Daniel Smith, petitioner's co-conspirator, which established that the conversations with petitioner involving the burning of the building had occurred within a three-month period preceeding the fire (R119-120), the lower court declined to issue a writ of habeas corpus with respect to the conspiracy charge.

Specifically, the court found that a three month period for an ongoing conspiracy is not so broad a period of time as to deprive the petitioner of his ability to contest the extradition. The absence of any proof with respect to petitioner's whereabouts for the vast majority of the conspiratorial period was sufficient cause for the denial of a

hearing on that issue. The lower court was well within the ambit of its discretion to decline to hold a hearing. Because the extradition demand of the State of South Carolina is clothed in a "presumption of regularity," Michigan v. Doran, 439 U.S. at 290, and the petitioner failed to provide sufficient facts to rebut that presumption, the denial of a hearing was not error.

Preservation of Issue

For the first time in the context of the instant litigation petitioner now raises before this Court the question of whether the State of South Carolina willfully falsified evidence of presence and flight to justify its extradition demand. The issue was not presented to the courts

of the State of New York and, therefore, does not present a federal question ripe for review by this Court. See Whitney v. California, 274 U.S. 357, 362-363; Saunders v. Shaw, 244 U.S. 317, 320.

Based upon the record of the proceedings below, that there is no evidence with respect to the "falsification" of records is highlighted by the fact that petitioner has recently moved in the court of original jurisdiction to renew and reargue the application for a writ of habeas corpus on the basis that the State of South Carolina provided erroneous and incomplete information to the Governor of New York in its extradition demand. The issue of falsification has not previously been presented to the Courts of the asylum

state for review and should not be raised for the first time on a petition for certiorari.

CONCLUSION

For all of these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 16th, 1986.